United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7208, 76-7211

To be argued by
ROBERT KLONSKY

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

BENITO LOPEZ,
Plaintiff-Appellee,

—against—

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,
Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLEE'S BRIEF

DICOSTANZO, KLONSKY & CUTRONA, P.C.
Attorneys for Plaintiff-Appellee
66 Court Street
Brooklyn, New York 11201
875-0155

ROBERT KLONSKY
Of Counsel

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Preliminary Statement

Plaintiff-Appellee's jury action against Egan Oldendorf,* for total and permanent injuries aboard defendant's vessel M/V "JOBST OLDENDORF" on the 21st of October, 1968, consequent on maritime negligence or unseaworthiness, and his consolidated direct action against Hoffman Rigging & Crane Service, Inc.,* pre-date the 1972 amendment of the Longshoremen's & Harbor Workers' Act, 33 U.S.C. 905(b). All issues, except for the initial jury verdict, were resolved by the trial Judge, Hon. Inzer B. Wyatt.

A third-party defendant, Paal Wilson & Co. A.S., the time charterer for the cargo involved, was excised from the proceedings by reason of an arbitration agreement and the consent of all relevant parties.

On the jury finding of negligence against the shipowner, the trial Judge resolved the shipowner's indemnity claim against plaintiff's employer, International Terminal Operating Co., Inc.,* by reason of the jury finding of plaintiff's 15% contributory negligence. As to the direct action against Hoffman, the trial Judge found it negligent and accordingly, signed a final judgment against both third-party defendants to equally pay the award of $310,250.00.

These appeals do not contest the fairness of the amount awarded.

The issues raised in appellants' briefs seek a *de novo* assessment of factual conclusions fairly resolved by the jury and the trial Judge.

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* Hereinafter the parties will be referred to as "shipowner", "Hoffman", and "I. T. O."

Hereinafter, we set forth a counter-statement of the issues, and a statement of facts that fully support the findings of fact by the jury and the trial Judge.

Counter-Statement of Issues on Appeal

1) Where shipowner's personnel negligently removed all lashings and chocks from a cargo of steel beams, one of which on the inshore side toppled over to pin the plaintiff when contacted by the first draft from the offshore side, how can the shipowner describe this as "an isolated, personal negligent act of a third-party?"

2) The "borrowed servant" defense by Hoffman, is without merit and seeks to avoid vicarious liability for the virtually conceded negligence of its employee Hogan who independently "topped" or moved the head of Hoffman's crane boom without a signal to do so from the signalman, to cause the draft thereon to swing and precipitate the unsecured inshore beam on to plaintiff.

3) As to the direct maritime action by plaintiff against Hoffman, the amended complaint recites its jurisdictional basis as "founded on the admiralty and maritime nature of the claim, within the meaning of Rule 9 (h) F.R.C.P. (8a)," ** as well as by Rules 14(a) and 15 (b), F.R.C.P., which Hoffman's brief ignores to unreasonably contend "laches". Hoffman was actively in the case as plaintiff's prime adversary, since it was served with process by the shipowner on August 7, 1969 (1a). All issues were fully litigated without prejudice to Hoffman.

** Numbers in parentheses with suffix (a) are page references to Joint Appendix; with prefix T reference is to the trial transcript.

Statement of Facts—Trial to the Jury

1. Physical and Background Facts

The defendant's M/V "JOBST OLDENDORF", a bulk cargo ship, arrived at 7:30 a.m. on October 21, 1968, after a voyage at sea (38a), and the accident occurred at 8:17 a.m., the same day (18a, 19a). The vessel was moored port side to the dock. There were no wings in #1 hatch except in the aft part, divided by a center bulkhead which extended from the after part to the coaming of that wing, a distance of 13 ft. (27a, 55a). The steel beam that fell on plaintiff was located on the port side close to and inshore of the divider bulkhead, measuring 16 X 16 inches X 26 feet 7½ inches, weighing 2.6 tons, stowed "with the height greater than the base causing an unevenness", rising above the other beams. (19a, 31a, 32a, 40a, 146a). The hatch square was 55 ft. by 26 ft., and the depth from the main deck, was approximately 17 ft. (33a). In its #1 hold, the cargo consisted of steel pieces of various sizes and shapes, mostly steel beams of varying lengths. There had been empty spaces between the steel cargo (40a).

A truck crane was leased from Hoffman by I.T.O. for for discharge of the steel cargo (13a), with an oiler Spillane, and an operator Hogan supplied by Hoffman (13a). The time charterer had decided to use a shore based crane instead of the adequate ship's gear (33a, 34a). This crane had an 80 ft. boom and a capacity of 65 tons (45a, 46a).

The ship's Master Rubstein, by deposition, testified that prior to the arrival of the longshoremen the lashings and chocks that secured the stow were removed by ship's personnel (17a, 20a, 21a, 29a). He stated that the First Officer had been in the hold before the longshoremen came

aboard, but no ship's officer was at the scene at the time of the accident (22a, 23a).

2. Manner of Happening of Accident

Arthur Gomez, the I.T.O. signalman, testified that the accident occurred on the attempted discharge of the first draft (51a); that all lashings, chocks and dunnage had been removed and this first draft was made up forward offshore (52a, 53a). His back was to Hoffman's dock-based crane, and he signaled with his hands while facing the hatch opening to observe what was going on below. After seeing that all the men had reached the aft wing for sanctuary, he gave a hand signal to raise the load by taking in on the cable (56a, 57a, 58a, 69a, 74a, 82a). The draft of steel beams, 62ft. in length, was caused to move inshore, when without any signal to do so, the Hoffman crane operator topped the boom by moving the head thereof and caused the draft, at an angle, to drag along inshore to strike the unsecured aft beam, which toppled over on the plaintiff (60a, 90a, 91a, 93a, 101a, 102a, 109a, 144a). The only other signal the witness gave was to stop after the accident (100a). There were no lashings or chocks to secure the beam that fell (61a).

Gomez' testimony was corroborated by plaintiff's partner John Scerenses. He testified that all the lashings should not have been removed by the ship's crew, "you remove just enough to take the draft off so the steel would be secured" (131a). Plaintiff's maritime consultant, Captain W. C. Ash, testified that it was unsafe to remove any "blocking, chocking, or shoring" from the beams until the inshore beams were ready for discharge (138a, 139a, 140a), and tag lines should have been used to control the draft (140a). Captain Ash read a statement of the cargo surveyor, signed by Captain J. Stave, but actually a report

by, Care W. Hansen (Def. Exh. B, T436). In pertinent part the statement reads as follows:

> "Injury to Longshoreman Mr. B. Lopez.
>
> "On October 21, at about 0820 hours, while attending on board, I noted that a longshoreman by the name of B. Lopez was injured during the discharging of steel beams from No. 1 hatch.
>
> "On the starboard side of No. 1 hold a lift consisting of about seven beams marked to be 62 feet long, was made up with two chain slings at the middle spread apart. When the lift was ready, the longshoreman went over to the port side afterpart in order to get out of the way.
>
> "During that maneuvering, in order to get the lift through the hatch square, which was 18 meters or 59 feet long, the after part of the lift suddenly swung over to the port side and hit an H beam, which was stowed on edges and somewhat higher than the other beams in the same area.
>
> "The beams first rolled over on its flange and then landed on the opposite edge.
>
> "The beam was marked . . . and measured 16 inches X 16 inches X 26 feet, 7½ inches long, said to weigh 2.6 long tons.
>
> "Mr. Lopez was standing next to the beam and got his left leg caught underneath same." (Defendant's Exhibit B, T371, 146a).

Hansen was called as a witness by the defendant, and produced photographs of the stow allegedly taken before and after the accident. The shipowner's brief on page 4 concedes there was "conflicting testimony" as to the removal of all the bracing or chocks from the beam that toppled over on plaintiff, prior to the accident. The jury has resolved this conflict.

The photographs marked in evidence were first disclosed 2 weeks prior to trial (158a), purportedly taken over seven years ago. In effect, the shipowner by the testimony of Hansen, contradicted its own ship's master Ruhstein who had testified by deposition that the beams were "unlashed and unclocked (sic)" (20a). No where in his statement signed by Stave (Deft's. Exh. B) is there mention of removal of lashings or the taking of photographs at the #1 hold. There was substantial proof assailing the credibility and recollection of Hansen, who might be deemed an "interested" witness (196a).

The Charge and Colloquy of Court and Counsel

Plaintiff's first request to Charge reads as follows:

"This case has two causes of action, one for negligence of the shipowner, and the other for unseaworthiness of its vessel. Should you find against the plaintiff on one cause, you may nonetheless find for him on the other."

There was no exception taken to this request or any portion of the Charge related to it.

In his Charge the trial Judge admitted difficulty in explaining "the metaphysical" concept of the warranty of seaworthiness, and this may explain why the jury found the shipowner negligent and the vessel not unseaworthy. On negligence his instructions were clear, predicated on "active" negligence by the crew in the removal of lashings and chocks (157a, 165a, 175a, 177a). The special questions to the jury on unseaworthiness were limited to "improper stowage" and "improper handling" (189a). Inconsistency is not contended in appellants' briefs.

The jury trial concluded on February 10, 1976 and was adjourned for the non-jury testimony to March 5, 1976.

The Non-Jury Trial

Plaintiff's motion for leave to amend the complaint and allege a direct action against Hoffman was granted. The amended complaint and answer thereto are set forth in the joint appendix (6a-10a). The jurisdictional basis is set forth in paragraphs 4, 5 and 6 of the complaint, (8a). Hoffman's hyperactive participation in all the proceedings, as if a direct defendant since it was served in 1969, is established in the docket entries (1a-5a).

Plaintiff rested on the proof before the jury and Hoffman proceeded in its defense to the third-party complaint and the direct action. Its first witness was Lloyd Spillane, oiler for the truck crane involved. It was his testimony that he was paid wages by Hoffman, took orders from his boss at the yard and that he considered Hoffman to be his sole employer (239a to 243a).

Leo Hogan, the crane operator testified that Spillane's duty was to "drive the crane, inspect it under my supervision and set it up for work" (244a). It was Hogan's initial function to "look into the hatch before working and decide how the crane should be positioned to most efficiently unload the ship" (245a). He did not previously know the signalman (270a, T71), did not discuss the signals with him and in no statement given did he indicate that the topping or raising of the boom was anyone's decision but his own, without any signal by himself or Gomez (255a to 257a). In a statement given on the day of the accident Hogan referred only to the signal to raise the draft (272a, 273a, 274a), which was repeated in his second statement (274a, 282a). At the time of trial Hogan attempted to persuade the Court that he signaled the signalman he intended to top the boom (25a). On this the Court's finding of fact is that the crane operator raised the boom without

any signal from the signalman, and this was negligence, corroborated by the absence of any mention in prior statements of this recent defense (300a, 301a).

Further findings of fact fairly stated that the elevating of the boom caused the sliding motion inshore of the draft which struck one of the beams (301a, 302a). The Court accepted the jury's evaluation of damages, and decided that one half be paid by I.T.O., and one half by Hoffman (302a).

Hoffman also contended that the crane operator and the crane oiler were "borrowed servants of I.T.O." (304a, 305a), to which I.T.O. counsel's responded as follows:

> "On the basis of the testimony that was elicited this morning from Mr. Spillane and Mr. Hogan, to meet that contention in the brief of Hoffman first delivered this morning, the testimony is unequivocal and undisputed that these employees were never the *ad hoc* employees of ITO. They took no orders from ITO, they were hired and fired by Hoffman, the direction and control over all their activities was by Hoffman, and therefore there is no *ad hoc* employee contention that could possibly be viable in this case". (305a, 306a)

POINT I

The jury's verdict is amply supported by the record herein on the shipowner's active negligence, in a context of proof distinct from the meaning of *Usner* v. *Luckenbach Overseas Corp.*

The shipowner contends error by reason of a "third-party's single and wholly unforeseeable act of negligence." Reference is made to the widely misunderstood *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 514. Mr. Justice Stewart wrote that this decision does not change the maritime law as it had developed to date, as follows:

> "The present case, however, offers no occasion to re-examine any of our previous decisions. We may accept it as fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman like the petitioner. We may accept it as settled, too, that the shipowner is liable though the unseaworthiness be transitory, and though the injury be suffered elsewhere than aboard the vessel". (pp. 497-498 of 400 U.S.).

What has been done in *Usner*, supra, is to express a distinction between negligence and unseaworthiness, the latter requiring a condition, with liability predicated on how that condition came into being ". . . whether by negligence or otherwise". *Grillea* v. *U.S.A.*, 232 F. 2d 919 appears revived on the original meaning of operational negligence. The decisional examples cited in *Usner*, supra, are the leading cases that have expanded the warranty and inclusion of longshoremen as *pro hac vice* seamen. It ostensibly reaffirms this non-delegable, continuing and ab-

solute obligation of the shipowner as a species of liability without fault, and without loss of its vigor and effect.

The *Usner* opinion also agrees liability follows where

> "The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service." (p. 499 of 400 U.S.).

This Court in *Siderewicz* v. *Enso-Gutzeit O/Y, Finn Lines, Ltd., O/Y et al.,* 453 F. 2d 1094, assessed the meaning of *Usner,* supra, as follows:

> "The first issue is whether a prima facie case was made that the technique of unloading was improper. If so, a jury question of unseaworthiness has been presented; the Supreme Court reiterated in *Usner* v. *Luckenbach Overseas Corp.,* 400 U.S. 494, 499, 91 S. Ct. 514, 27 L.Ed. 2d 562 (1971), that a ship's unseaworthy condition could arise from an improper method of loading her cargo, and an improper method of unloading falls into the same class. *Gutierrez* v. *Waterman S.S. Co.,* 373 U.S. 206, 211-215, 83 S. Ct. 1185, 10 L.Ed. 2d 297 (1963); *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 2d 798." (p. 1095 of 453 F. 2d).

In *Amador* v. *A/S J. Ludwig Mowinkels Rederi,* 224 F.2d 437, where a stow of wirecoils destined for another port was in the way of discharge of steel beams, causing contact and the toppling of the wire coils injured plainff, L. Hand, C.J. held as follows:

> "The stowage was therefore only condtionally proper and we do not see how the ship can escape liability when she allowed a stow, only conditionally

> proper, to be discharged without the fulfillment of the condition".

In Accord: *DeMauro* v. *Central Gulf S.S. Corp.*, 514 F.2d 403; *Falletta* v. *Armatori*, 476 F.2d 316.

So in the instant case the active negligence of the ship's crew is an obvious distinction from the facts in *Usner*. In *Conceicao v. New Jersey Export Marine Carpenters, Inc.*, 508 F. 2d 437, 442 (C.A. 2d), cert. den. 95 S. Ct. 1680, on negligence of the shipowner in giving misinformation and by failing to supervise, when an overloaded pipe-bed was caused to disrupt the protective uprights and injure a longshoreman, this Court distinguished *Usner* as follows:

> "Although the Supreme Court in *Usner* spoke to a situation in which neither the shipowner nor the crew were involved in the accident, the logic of the opinion applies with equal force to situations in which an isolated act of the shipowner proximately caused the accident. The jury might properly have concluded that the shipowner's inadequate instructions to The Carpenters created a further duty to supervise the actual loading of the pipes and that the breach of this latter duty as an excessive number of pipes were loaded into the crib was the isolated event which cast liability on the shipowner for negligence".

Prior instructions by a ship's representative were deemed "active" participation, a distinction from *Usner*, even more so in the instant case where "active" negligence was physical application by the ship's personnel to remove all that secured the heavy and cumbersome cargo of steel, with negligent disregard of the operative procedure by the longshoremen in having to move the drafts over unsecured steel beams.

Defendant's reference to *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660 is misplaced. The Court by Gurfein, C.J., recognizes a difference "where operative negligence was the fault of one of the ship's officers" (P. 663 of 512 F. 2d 660). Referring to *Conceicao,* supra, this Court held that *Usner* means a crew member's "single separate act may constitute operative negligence, though it may not necessarily create a condition of unseaworthiness" (P. 663 of 512 F. 2d 660).

In accord *Henry and Braye* v. *A/S Ocean & John P. Pederson & Sons,* 512 F.2d 401 (2 Cir., 1975), holding that negligence may be found despite the jury's findings that the vessel was not unseaworthy, Mansfield, C.J., stating as follows:

> "Even if the court had defined unseaworthiness in broader terms, we would hesitate in these circumstances to overturn the jury's findings of seaworthiness and negligence on grounds of inconsistency. Verdicts finding negligence but no unseaworthiness have been accepted despite an apparent conflict in the findings." (p. 405 of 512 F.2d).

In Accord: *Malm* v. *United States Lines,* 269 F. Supp. 731 (S.D.N.Y.) affd. on the district court's opinion (Weinfeld, D.J.), 378 F. 2d 941 (2d Cir. 1967); *Keliher* v. *Nebo,* 40 F. 31. The general rule is that a Court should reconcile the jury's verdict if at all possible. *See Gallick* v. *Baltimore & Ohio R.R.,* 372 U.S. 108, 83 S. Ct., 659.

On the trial judge's difficulty to define unseaworthiness, it follows from the answers to the special questions that the plaintiff and not the defendant was prejudiced thereby. Perhaps the problem is expressed best by Judge Clark, dissenting in *Esekiel* v. *Volusia S.S. Co.,* 297 F. 2d 215, 218,

that "It seems very difficult for courts to accustom themselves to the strict liability of unseaworthiness, perhaps because it is cut on such a different pattern than the familiar negligence action."

Defendant shipowner sought to save the cost of hiring an independent contractor to remove the lashings seriatim as the work progressed from the offshore side to the inshore side, so that only the part of the stow being discharged would be unlashed and unchocked. There is no reason to place the burden on the back of the totally disabled plaintiff injured while seeking sanctuary in the aft inshore area proximate to the unsecured 27 ft. beam. By the very act of cargo discharge a conditionally proper stow was the cause of the toppling of the beam when the condition of securing or first removing the unsecured stow was not fulfilled, as in *Amador* supra. Though raised at the time of argument on motions we assume that by reason of further reflection the other parties to this lawsuit decided to abandon the issue of special verdict inconsistency on appeal. *Bernardini,* supra, is cited in the shipowner's brief for a different proposition of law than inconsistency, prompting that reversal. The jury verdict here is not idiosyncratic, but even if it were, it is a foremost principle of this Court that a special verdict must be reconciled wherever possible.

POINT II

The direct action against Hoffman complies with the pertinent rules and jurisdictional authorities regardless of non-diversity of citizenship.

Hoffman's brief on appeal complains of jurisdictional failure on the basis of non-diversity of citizenship between plaintiff and Hoffman. This was not raised as an issue in Hoffman's form C, "Civil Appeal Pre-Argument Statement"; nonetheless, we shall treat it as a viable contention on appeal.

Plaintiff was granted leave to file an amended complaint alleging a direct action against Hoffman. As this is a maritime accident occurring aboard a vessel in navigable waters, the amended complaint in accordance with Rule 9(h) alleged that "jurisdiction is founded on the admiralty and maritime nature of the claim, within the meaning of Rule 9(h) F.R.C.P. and other applicable statutory provisions." Rule 14(a), F.R.C.P. pertinently states as follows:

> ". . . "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . ."
>
> *and Rule 15(b) provides:*
>
> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

failure so to amend does not affect the result of the trial of these issues. . ."

All of Rule 14(c), dealing with admiralty and maritime claims, was added by the 1966 amendments and provides:

> "(c) ADMIRALTY AND MARITIME CLAIMS. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff."

In *Wasik* v. *Borg* v. *Ford Motor Company,* 423 F. 2d 44 (CA 2, 1970), Feinberg, *C.J.* for this Court held that the plaintiff could assert a claim against the third-party defendant, and though he did not do so a formal motion would have been granted even at the Circuit Court level.

As in the instant case:

> "The trial record makes it clear that Ford had the opportunity to, and did, litigate all the factual issues essential to the jury verdict, particularly Borg's claim that the throttle cable of his Ford vehicle was in a

"runaway condition". All the issues were raised, either by Wasik's pleadings or by Borg's. And it is also evident that counsel for Wasik early sought the benefit of Borg's theory of the accident."

"We see no reason to treat the issues which were fully litigated as if they had not been litigated, where no prejudice to appellant had been suggested or is apparent from the record. Under these circumstances, we do not think it was error for the trial judge to treat appellant as a defendant potentially subject to primary liability. See *Falls Industries, Inc.* v. *Consolidated Chemical Industries, Inc.*, 258 F. 2d 277, 283-287 (5th Cir. 1958); 3 J. Moore, Federal Practice 15.13".

On jurisdiction despite non-diversity we commend to this Court the advanced, albeit minority reasoning of *Morgan* v. *Serro Travel Trailer Co., Inc.* v. *Mitchell,* (US Dist. Ct., D. Kan, December 30, 1975) 21 FR Serv2d 4, applying Rule 14 in a non-diversity case. Collusion is shown to be an "untenable fear . . . to avoid jurisdictional limitations" Rule 14 does not require diversity between a plaintiff and third-party defendant. In accord: *United Mine Workers* v. *Gibbs,* 383 US 715, 724 (1966), with a strong suggestion for expansion, as follows:

"Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

Apart from the advanced *Morgan* reasoning, the maritime nature of this case brings it within the intendment of Rule 9(h). Moore, Federal Practice, Federal Civil Rules, Part 1, 1975, clearly defined the preservation of admiralty

and maritime rules where there is a "maritime basis for the Federal Court's jurisdiction, and the claim is properly identified pursuant to Rule 9(h) (pp. 419, 420)".

On the inappropriate defense of laches this Court in *Hill* v. *W. Bruns & Co.*, 498 F. 2d 565 (1974) held there must be proof of prejudice on the part of the defendant to establish a defense of laches in an admiralty suit. There is no showing of prejudice in the instant case, and here again the defendant Hoffman has failed to sustain its burden of going forward with the evidence. As this Court stated by Oakes, C. J.:

> "Laches is a doctrine aimed at avoiding the commencement of stale claims in equity where it is impossible or difficult for a defendant to defend because evidence has been destroyed or lost and the defendant thereby prejudiced as a result of the delay in the institution of the action.
>
> "We have come a long way since the days of Baron Parke, who, it will be recalled, was proud of the fact that he had decided all cases on procedural grounds; much less do his doctrines apply in admiralty." (p. 568 of 498 F.2d.)

POINT III

The "borrowed servant" defense is without merit on the facts and law pertinent herein.

The reply brief of I.T.O. concisely sets forth some of the authorities in point and they are incorporated herein by reference.

A recent discussion of basic principles on the "borrowed servant" rule is in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 95 S.Ct. 472, relating to F.E.L.A. exclusion of an employee of a wholly owned subsidiary of the defendant. The Court held that a finding of "agency was not tantamount to a finding of a master-servant relationship". Coordinated work was held not to create a "conventional common law servant", one subservient to the other. In fact the sudden movement of the draft, without any signal, bespeaks the crane operator's independent negligence. New York cases are in accord, at most requiring a fact finder's determination. Hoffman's motion to dismiss on the basis that its employees were in the control of I.T.O. raises at most a question of fact which has been resolved by the trial Judge in his non-jury role as fact-finder.

Only where the lessee has continuous and unquestioned control of the vehicle, and the driver completely under the unquestioned control of another with the owner's permission and consent, could the general employer rebut the presumption of the owner's supreme control and right of direction. *Irwin* v. *Klein*, 271 N.Y. 477, 3 N.E. 2d 601; *Fluegel* v. *Coudert*, 244 N.Y. 393, 155 N.E. 683.

In *Braxton* v. *Mendelson*, 233 N.Y. 122, 135 N.E. 198, where a defendant in the trucking business had furnished drivers gasoline and was paid by a milk company a sum each day for each truck, Andrews, J. held the vehicle owner liable for the negligence of the driver though the vehicle

was used pursuant to orders of the milk company foreman. The general employer was held liable on the basis that its driver was doing its work while delivering milk in pursuance of the terms of a contract. Andrews, J., also held there could be an oral contract, and the indicia of control for jury determination might be resolved from proof as to who paid the wages, who had the right to direct the servant where to go and what to do, who had custody or ownership of the instrumentalities, the nature of the business of the employer and that of the special employer, and finally, terms of any contract, written or oral. All these tests and more pertain to Hoffman's employees to prompt vicarious liability.

In *Ramsey* v. *New York Central Ry. Co.*, 269 N.Y. 219, 199 N.E. 65, Hubbs, J., wrote that the negligence of a crane operator for the railroad is imputed to his employer, rather than the contractor whose employees helped in the work and gave directions as to details. See: *Viggiano* v. *Reppenhagen, Inc.*, 55 N.J. Super. 114, 150 Atl. 2d 40.

Cannon v. *Fargo*, 222 N.Y. 321, 328, is cited as follows:

> ". . . the servant of one master to become, for the time being, the servant of another must pass out of the direction and control of the former into that of the latter".

General orders to a servant determine control, distinguished from one who gives specific directions from time to time. *Bartolomeo* v. *Charles Bennett Contracting Co.*, 245 N.Y. 66, 156 N.E. 98, by Kellogg, *J.* If the work done by a servant is "indirectly but substantially beneficial" to the employer, such as helping to dismantle when his primary function was to install, and so promoted good will and aided the sale, the presumption that the general em-

ployer still has control was not rebutted. *Charles* v. *Barrett,* 233 N.Y. 127. At the very least, this becomes a question of fact for the jury. *Delisa* v. *Schmidt,* 285 N.Y. 314, 34 N.E. 2d 336, by Desmond, *J.* See: *Kristiansen* v. *Wagner's Steel Erectors, Inc.,* 295 N.Y. 668; *Matter of Sullivan,* 202 A.D. 684, 195 N.Y. Supp. 168, aff'd 234 N.Y. 552. Without knowledge or consent a person does not become the servant of another. *Doran* v. *N. Y. City Int. Ry Co.,* 239 N.Y. 448, 451.

CONCLUSION

The plaintiff has no brief as to the cross-claims and indemnity. His concern relates to the cases against the shipowner and Hoffman. It is apparent that the jury verdict against the shipowner for negligence is properly grounded in fact and law. Further, even if this learned Court should decide in favor of the shipowner, plaintiff has clearly established a direct action for obvious negligence against Hoffman in a manner and method of suddenly, without a proper signal, topping the boom and causing the draft to topple an unsecured beam on to the person of the plaintiff. There is no question on excessiveness of the jury award, adopted by the trial judge in the non-jury trial.

WHEREFORE, plaintiff respectfully prays that the judgment herein in favor of the plaintiff plus interest and costs be affirmed.

Respectfully submitted,

DI COSTANZO, KLONSKY & CUTRONA, P.C.
Attorneys for Plaintiff-Appellee

ROBERT KLONSKY
On Brief

Service of 2 copies of this within
Brief is admitted this
26 day of August 1976.

Alexander Ash Schwartz & Cohen
ATTORNEYS FOR Appellant-Appellee
Int'l Terminal Operating Co.

Attys for Appellant-Appellee Cyan Redondo

Hill Betts & Nash
Attys for Appellant-Appellee Hoffman Rossing, etc

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